STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2014
v	No. 314268 Genesee Circuit Court
MARCUS DARNELL LANES, Defendant-Appellant.	LC No. 12-030396-FC

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, second-degree murder, MCL 750.317, and first-degree murder, MCL 750.316. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of life imprisonment for each first-degree murder and robbery conviction, and 100 to 150 years for the second-degree murder conviction.

We affirm defendant's convictions and sentences for two counts of first-degree murder and two counts of armed robbery, but vacate his convictions and sentences for one count of first-degree murder and second-degree murder, and remand for correction of the judgment of sentence in this regard.

I. FACTUAL BACKGROUND

Defendant's convictions arise from the stabbing deaths of 53-year-old Phyllis Woodson and her father, 78-year-old Charles Woodson, in their Flint Township townhouse in late November 2011. The prosecution's theory was that at some time between November 23 and 26 defendant argued with Phyllis—his girlfriend—about money, stabbed her multiple times with a kitchen steak knife, and because Charles might have heard what happened, defendant went to the upstairs bedroom and stabbed Charles multiple times.

A family member contacted the police on November 26 after Phyllis and Charles failed to come to Thanksgiving dinner on November 24 and did not answer their door or phones on November 25 and 26. When the police arrived at the Woodson's home, they found both the front and back doors locked with no signs of forced entry. The police identified defendant as a

person of interest, and subsequently learned that he was staying at the East Village Inn in Flint. The police arrested defendant on November 27.

At the time of his arrest, defendant was in possession of the victims' car keys, house keys, and jewelry. A witness in defendant's motel room testified that defendant placed the jewelry on her after the police arrived at the motel. The police found a kitchen knife that matched a set from the Woodson's home in defendant's motel room. Blood on defendant's boot and jacket matched a DNA sample from Charles. A jailhouse informant testified that defendant admitted to stabbing his girlfriend during an argument about money, and then stabbing her father.

At trial, the defense presented an alibi defense and attacked the credibility of the prosecution witnesses and the police investigation. However, the jury found defendant guilty of two counts of first-degree felony murder, two counts of armed robbery, second-degree murder, and first-degree murder. Defendant was sentenced to life in prison. Defendant now appeals on several grounds.

II. OTHER ACTS OF DOMESTIC VIOLENCE

A. STANDARD OF REVIEW

Defendant first argues that the trial court abused its discretion when admitting MCL 768.27b evidence regarding defendant's acts of domestic violence against his former girlfriend. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.* (quotation marks and citation omitted). If "the decision involves a preliminary question of law, [such as] whether a rule of evidence precludes admissibility, the question is reviewed de novo." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

B. ANALYSIS

MCL 768.27b(1) provides, in relevant part, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant[.]" The definition of "domestic violence" or an "offense involving domestic violence" includes acts "[c]ausing or attempting to cause physical or mental harm to a family or household member." MCL 768.27b(5)(a)(*i*). "Family or household member" includes "[a]n individual with whom the person resides or has resided," and "[a]n individual with whom the person has or has had a dating relationship." MCL 768.27b(5)(b)(*ii*) and (*iv*). "'[D]ating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27b(5)(b)(*iv*).

Here, defendant's former girlfriend testified about the threats and physical abuse she suffered at the hands of defendant. Defendant contends that such evidence was not admissible because "[t]he charged conduct in this case was not domestic violence." However, the proper inquiry is not whether the offense is labeled "domestic violence" but whether it is "an offense

involving domestic violence" as defined in MCL 768.27b(5)(a). See *People v Railer*, 288 Mich App 213, 220-221; 792 NW2d 776 (2010). Defendant was charged with first-degree felony murder and open murder for the stabbing death of Phyllis. Accordingly, defendant was accused of "causing . . . physical . . . harm to a family or household member." MCL 768.27b(5)(a)(*i*).

Defendant's claim that he was not a "family or household member" to Phyllis is equally unavailing. In his opening statement, defense counsel conceded that defendant was "not hiding" that he and Phyllis had a consensual sexual relationship. Defendant thereafter testified that he began a dating relationship with Phyllis while his former girlfriend was out of town in August 2011. Thus, Phyllis qualified as a "family or household member" pursuant to MCL 768.27b(5)(b)(*iv*).

Furthermore, the evidence was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: any tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998) (quotation marks omitted). Here, evidence that defendant assaulted a former girlfriend assisted the jury in weighing and assessing credibility, particularly because defendant denied any wrongdoing and implied that another person entered the apartment and stabbed Phyllis multiple times. The fact that defendant harmed his former girlfriend—during a fit of anger when she did not behave in accordance with his desires—sheds light on the prosecutor's theory that defendant assaulted Phyllis when she would not give him what he wanted, i.e., money. As we have previously found, the "prior-bad-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant's history . . . tends to shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011) (quotation marks, brackets, and citation omitted).

Moreover, any prejudicial effect did not substantially outweigh the probative value of this evidence. Pursuant to MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. However, "[i]n this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). In other words, while "[a]ll relevant evidence is prejudicial; only *unfairly* prejudicial evidence may be excluded." *People v Danto*, 294 Mich App 596, 600; 822 NW2d 600 (2011) (emphasis in original). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury. Unfair prejudice may arise where considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected." *Id.* (quotation marks and citation omitted).

We are not persuaded that the jury was somehow unable to weigh the evidence in a rational fashion. The relatively limited evidence that defendant domestically assaulted his former girlfriend was not so shocking or horrendous that the jury would accord it undue or preemptive weight. The trial court's decision to admit the evidence did not fall outside the range of reasonable and principled outcomes. *Feezel*, 486 Mich at 192.

III. ADJOURNMENT

A. STANDARD OF REVIEW

Next, defendant challenges the trial court's denial of his motion for an adjournment. "This Court reviews the grant or denial of an adjournment for an abuse of discretion." *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Feezel*, 486 Mich at 192 (quotation marks and citation omitted).

B. ANALYSIS

On the first day of trial, defendant requested an adjournment to provide appointed defense counsel—defendant's third appointed attorney—more time to prepare for trial and to investigate and locate potential alibi witnesses. The trial court denied defendant's request and he now argues this was in error. We disagree.

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must show prejudice as a result of the trial court's denial of an adjournment. *Snider*, 239 Mich App at 421.

In the instant case, defendant has not established good cause for an adjournment or that he was prejudiced by the trial court's ruling. While defendant argues that appointed defense counsel was not prepared, there is no record of trial counsel needing more time. To the contrary, the record shows that on the first day of trial, counsel appeared to be fully aware of the facts of the case and prepared to proceed. Trial counsel's questions, remarks, and arguments throughout trial demonstrated that he was familiar with the case and prepared for trial.

The record also indicates that before trial, defense counsel visited and discussed the case with defendant, researched, and brought three pretrial motions in limine that resulted in rulings favorable to defendant. Defendant acknowledged that he talked with counsel for 3-1/2 hours, and defendant did not indicate what other valuable information could have been shared had counsel spent additional time with him. Furthermore, as the trial court accurately observed, trial counsel also benefited from the 180 days in which the two prior attorneys worked on the case. Defendant's first attorney was cooperative and turned over his trial notebook to the second attorney. Defendant's second attorney hired a private investigator to locate potential witnesses, subpoenaed videotapes from Hurley Hospital and the East Village Inn motel, arranged for a second opinion regarding potentially harmful scientific evidence, obtained cell phone records for five cell phones that defendant claimed would be helpful, and turned over his trial notebook to trial counsel. Other than arguing more time was needed to locate alleged defense alibi witnesses, defendant does not sufficiently argue what outcome-determinative action trial counsel could have taken if he had more time to prepare.

The crux of defendant's argument seems to be that his trial counsel failed to locate unnamed defense witnesses. However, throughout the proceedings, defendant's attorneys

repeatedly asked defendant for the names of the alleged witnesses. More than four months before trial, at his second attorney's request, the court appointed an investigator to assist in locating witnesses. The record reflects that prior counsel attempted to locate witnesses, but was unable to do so. When defendant made his untimely request to adjourn on the first day of trial, he was again asked to provide identifying information about the witnesses. Although the court did not adjourn trial, it directed the case detective and private investigator to attempt to locate the hospital nurses and the Detroit and Flint motel clerks that defendant requested. Counsel also called two Detroit telephone numbers listed on cellular telephone records that defendant claimed would contain information for the Detroit motel, but neither number was helpful. Two hospital nurses were located and ultimately testified at trial.

It is pure speculation to conclude that the remaining witnesses proposed by defendant even existed, that they would have remembered defendant, or that they would have testified favorably to the defense. Defendant is unable to show either good cause or actual prejudice in the trial court's denial of an adjournment. Accordingly, the trial court did not abuse its discretion.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Defendant next argues that because trial counsel failed to investigate and produce several alibi witnesses, his representation was ineffective. Defendant failed to raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing, thus our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

B. ANALYSIS

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687.

Defendant argues that trial counsel was ineffective for failing to conduct an investigation to locate the alibi witnesses. However, defendant has not overcome the strong presumption that trial counsel's performance was within the range of reasonable professional conduct. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant failed to provide names, let alone addresses or phone numbers, for the witnesses he claimed his attorney should have investigated. As the United States Supreme Court observed: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland*, 466 US at 691.

Furthermore, as discussed *supra*, great efforts were made to locate the alleged alibi witnesses. Defense counsel was aware that defendant's second attorney had hired a private investigator to locate the potential witnesses and had obtained numerous hours of videotape from two locations where defendant claimed to be. Trial counsel discussed the case with the prior attorney and had the benefit of prior counsel's case notebook and the investigative notes. As trial counsel explained, after discussing the case with the prior attorney, trial counsel decided to take prior counsel's word about the availability of the witnesses and concentrated his efforts and time in other areas. We find defense counsel's behavior objectively reasonable.

Moreover, defendant failed to show that any additional effort by trial counsel would have produced witnesses who could have helped the defense. There simply is no evidence that the witnesses existed let alone that they would have testified favorably to the defense. Consequently, defendant has failed to show prejudice.

Lastly, defendant contends that his counsel presented an unhelpful defense. However, defendant does not indicate what additional defense or actual witnesses that trial counsel could have presented. To the extent that defendant relies on the lack of success at trial, we will not substitute our judgment for that of trial counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Rockey*, 237 Mich App at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant has failed to establish ineffective assistance of counsel.[1]

V. MOTION FOR A MISTRIAL

A. STANDARD OF REVIEW

Defendant next contends that the trial court erred in denying his motion for a mistrial. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 236 (quotation marks and citation omitted).

[1] Moreover, for the reasons discussed *supra*, we do not find that defendant was denied his constitutional right to present a defense. *People v King*, 297 Mich App 465, 473-474; 824 NW2d 258 (2012).

B. ANALYSIS

In moving for a mistrial, defendant cited the testimony of the following three witnesses: (1) defendant's former girlfriend who referenced defendant's "parole officer;" (2) a police officer who testified that defendant's name was in a "police report" in context of Phyllis's problems with a boyfriend with whom she had an abusive relationship; and (3) the woman in defendant's hotel room who was instructed to avoid mentioning the hostage situation, but testified that defendant put his arm around her neck and that she "tried to escape."

When viewing the testimony individually and cumulatively, we concur in the trial court's assessment that there were no grounds for a mistrial. "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). In this case, neither defendant's former girlfriend nor the police officer violated a court order when referencing defendant's parole status or his name in a police report. Further, their testimony only implied that defendant had a prior criminal record, without detail or explanation. Each witness's reference was brief and isolated, without further emphasis to the jury. Therefore, it is unlikely that defendant suffered any significant prejudice. "Reversal is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion." *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992).

As for the woman in the hotel room, defendant is correct that she was ordered not to mention the hostage situation. However, her use of the word escape, in context, did not tend to suggest that defendant had been holding her hostage, but merely expressed her desire to leave the room when the police arrived. Moreover, regarding all of her remarks, they were unsolicited and unprompted. The prosecutor merely asked her "how'd you two meet" and if they had an agreement for what she was supposed to do with the jewelry. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

VI. PROSECUTOR'S CONDUCT

A. STANDARD OF REVIEW

Defendant next contends that he is entitled to reversal because the prosecutor impermissibly shifted the burden of proof through a series of questions during cross-examination and remarks during closing arguments. Defense counsel objected to the prosecutor's questions about defendant's failure to call his sister as a witness, thereby preserving that claim. "We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

However, defendant did not object to: (1) the prosecutor asking him why he did not list his sister on his notice of alibi, (2) the prosecutor asking him why he did not explain the origin of

the cut on his hand to the police,[2] and (3) the prosecutor's remarks during closing argument. Therefore, those claims are unpreserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (quotation marks and citation omitted)

B. DEFENDANT'S SISTER

As part of his alibi defense, defendant testified that he was driving his sister's car during the relevant time period. During the prosecutor's cross-examination of defendant, the following exchange occurred:

> *Q.* Okay. And you're driving your sister's car at this point, right?
>
> *A.* Yes, sir.
>
> *Q.* Did you call her? Did you think to call her to verify that you were with her car . . .
>
> *A.* For what?
>
> *Q.* . . . that you had her car?
>
> *A.* For what? She knew I had her car.
>
> *Q.* That would be wonderful if she could tell us that, wouldn't it?
>
> *A.* Well, it was – I mean, you got all the – everything – I see – you got everything that I gave my attorney, I think.
>
> *Q.* No, no, no.
>
> *A.* I don't know – my – I don't have anything to do with who you call. You know what I'm sayin'? And who you don't call.
>
> *Q.* I know that. Why didn't you call her?
>
> *A.* I didn't call anybody.

[2] Although defendant argues that this claim is preserved, the record discloses that he made only a general objection about his failure to bring in telephone records and not to the exchange about his failure to inform the police how he received the cut on his hand. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011).

* * *

Q. You never gave us a witness list confirming your alibi?

A. No, if I gave you – no, I'm talking about a [sic] alibi witness list. I gave you – I did not give you a list for material witnesses, is what you're told – what I'm told, not by you – I didn't – my attorney didn't give you one or my past attorney didn't give you one.

* * *

A. Well . . . . I didn't give you a material list, which my sister would've been on.

Q. Before . . . today, no one knew that your sister's car played any part in this.

A. That's what you say.

* * *

Q. You've seen the alibi notice that was filed in this case?

A. If he didn't give it to you, what do you – how you gonna doubt me . . .

Defendant now argues that the prosecutor improperly shifted the burden of proof. "A prosecutor may not imply . . . that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). While "a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). In such a situation, a prosecutor may comment on the defendant's failure to produce a corroborating alibi witnesses without shifting the burden of proof because he is "merely pointing out the weaknesses in defendant's case[.]" *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995) (quotation marks and citation omitted).

In this case, the prosecutor's theory was that defendant committed the offenses sometime between November 23 and 26. To rebut that theory, defendant focused on his contact with his sister during that time period and their arrangement that he use her car, not Phyllis's car. Accordingly, the prosecutor permissibly questioned defendant about his failure to call her as a witness to corroborate his alibi. Because defendant "advance[d] evidence or a theory" to explain his conduct, the prosecutor's subsequent questioning did not shift the burden of proof but merely highlighted the weaknesses and inferences of defendant's testimony. *Godbold*, 230 Mich App at 521; see also *Fields*, 450 Mich at 112. There was no error requiring reversal.

C. CUT ON DEFENDANT'S HAND

Both victims were stabbed multiple times with a knife, and the prosecutor theorized that defendant injured his hand during a struggle with the victims. During the prosecutor's cross-examination of defendant, the following exchange occurred:

> *Q.* This is a picture of what?
>
> *A.* My hand.
>
> *Q.* With a cut on it, right?
>
> *A.* Yeah.
>
> *Q.* That you claim that [your former girlfriend] gave you?
>
> *A.* November 17th.
>
> *Q.* All right . . . . You were conscious when they took this picture, correct?
>
> *A.* I called 911.
>
> * * *
>
> *Q.* No . . . That wasn't my question. You were aware – you were aware the picture of your hand was being taken?
>
> *A.* Yeah, I was – yeah.
>
> *Q.* Okay . . . We agree on this. At some point, did you offer up that story?
>
> *A.* Of what?
>
> *Q.* How you got the cut on your hand. They're taking a picture of it. They seem to be interested.
>
> *A.* No, I've already explained to you my – I'm not all that freely giving information to police. I don't do it like that. You got my phone records.

As an initial matter, the prosecutor's reference to defendant's pre-arrest silence did not implicate a constitutional right. Because the silence did not pertain to defendant remaining silent in the face of police interrogation or invoking his right to remain silent in reliance on *Miranda* warnings,[3] the silence was not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Furthermore, as discussed *supra*, once defendant

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602, 1610; 16 L Ed 2d 694 (1966).

advanced an alternate theory of how his hand was cut, the prosecutor was permitted to challenge the credibility of defendant's story. In other words, rather than requiring defendant to prove his innocence, the prosecutor was "assail[ing] [defendant's testimony] like that of any other witness." *Fields*, 450 Mich at 110 (quotation marks and citation omitted).

D. CLOSING ARGUMENT

Defendant also argues that the prosecutor shifted the burden of proof during closing argument when stating:

> You heard [the woman in the hotel room] testify that she was given this jewelry by the defendant. She recognized the bracelet, that remember, Debra Woodson-Williams recognized and Tanya [Woodson] . . . recognized. Somehow, someway, all this jewelry ends up in [defendant's] room. Do we really believe him when he says that [the woman in the hotel room] introduced it? What are the odds of that . . . .
>
> * * *
>
> Again, Phyllis—neither Phyllis nor Charles would have given that jewelry. That's not something that got thrown in the box by mistake. He wants us to believe that [the woman in the hotel room] went over there and was somehow involved with this homicide. Besides his allegation that's what happened, and I say allegation because indirectly he says that she had the jewelry, she must have something to do with it, is what he's trying to get you to say. *What other evidence is he offering*? This is jewelry they're not going to give up and it randomly comes to his possession.
>
> * * *
>
> We have a stab wound on the hand of the victim—or on the hand of the defendant. If you're holding someone down and you stab in the struggle, in the tussle, as Yolanda Parlor states it, and you miss. Now, he wants you believe that [defendant's former girlfriend] did the stabbing, but he didn't ask her about that when he had the chance. He didn't call anyone from the police when he filed the report. He didn't call the 911 operator to confirm that, yeah, that was there before. But, he wants you to believe that now. . . . [Emphasis added.]

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *Fyda*, 288 Mich App at 463-464. "Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *Id.* at 464. However, prosecutors are afforded great latitude when arguing at trial, and may argue that evidence was "uncontradicted even if the defendant is the only person who could have contradicted the evidence." *Id.* at 464. They may argue the evidence and reasonable inferences arising therefrom, and are not restricted to the blandest terms possible. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Here, the challenged remarks were permissible commentary on the credibility of defendant's evidence. The prosecution presented evidence at trial that defendant stabbed the victims and stole their possessions. The prosecution's statements in closing merely encouraged the jurors to use their common sense in evaluating the evidence, was responsive to the evidence and theories presented at trial, and did not impermissibly shift the burden of proof. Further, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, that defendant was not required to prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

VII. DOUBLE JEOPARDY

Defendant next argues that his four murder convictions, arising from the stabbing deaths of two victims, violated double jeopardy. The prosecution concedes. Therefore, we agree that defendant cannot properly stand convicted of four counts of murder arising from the deaths of two victims. It is well-established that multiple murder convictions arising from the death of a single victim violates double jeopardy principles, and the remedy is to vacate one of the murder convictions. *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000).

Accordingly, we vacate defendant's second-degree murder conviction and one of the first-degree murder convictions, and remand for correction of the judgment of sentence to reflect only two convictions and two life sentences for first-degree murder in addition to the armed robbery conviction.[4]

VIII. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in his Standard 4 brief, none of which have merit.

A. JURY INSTRUCTIONS

Defendant claims that he is entitled to a new trial because the trial court failed to instruct the jury *sua sponte* on the limited use of the MCL 768.27b evidence, or to give a curative instruction regarding evidence of defendant's other bad acts. Because defendant did not request that the trial court provide these instructions, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753.

Defendant's claims are meritless for several reasons. First, "in the absence of a request or objection, the appellate courts have declined to impose a duty on trial courts to give sua sponte limiting instructions . . . even if such an instruction should have been given." *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999); MRE 105. Second, the MCL 768.27b evidence was properly admitted, as discussed *supra*, and its probative value was not

[4] The judgment of sentence may reflect that defendant's first-degree murder conviction is supported by two theories—first-degree felony murder and first-degree premeditated murder. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

substantially outweighed by a danger of unfair prejudice. In regard to the testimony of defendant's parole status, the hostage situation, and defendant's name in a prior police report, the trial court invited the parties to submit a curative instruction when defendant moved for a mistrial based on this evidence. Defendant declined. Defendant now cannot argue he is entitled to a new trial, as "a party may not harbor error at trial and then use that error as an appellate parachute[.]" *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). Defendant is not entitled to relief.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also asserts numerous other instances of alleged ineffective assistance of counsel. Because defendant failed to raise these additional ineffective assistance of counsel claims in the trial court, our review is limited to mistakes apparent on the record. *Sabin (On Second Remand)*, 242 Mich App at 658-659.

1. REQUESTING INSTRUCTIONS

Defendant argues that his defense counsel was ineffective for failing to request the jury instructions discussed *supra*. However, defendant has not demonstrated that counsel's behavior fell short of sound trial strategy, as declining to request these instructions avoided focusing the jury's attention on defendant's prior conduct. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Furthermore, defendant has not established that the failure to obtain these instructions altered the outcome of the trial.

2. WITNESS CREDIBILITY

Defendant next asserts that defense counsel failed to challenge the credibility of the jailhouse informant. Decisions regarding how to question witnesses are matters of trial strategy. *Rockey*, 237 Mich App at 76. Moreover, contrary to defendant's argument, defense counsel did challenge this witness's credibility. Defense counsel questioned the jailhouse informant regarding his recitation of the events, his motives for testifying, the fact that he was a heroin dealer, and inconsistencies and incredulous aspects of his testimony. Defense counsel further elicited the fact that the jailhouse informant saw stories about the homicides on television and in the newspaper. Thus, trial counsel did not behave objectively unreasonably.[5]

3. REMOVAL OF A JUROR

Defendant also challenges his defense counsel's decision not to seek removal of an allegedly biased juror. On the fourth day of trial, a juror sent a note advising the court that she saw a newspaper headline indicating that a "double homicide trial gets underway" with defendant's photograph. Pursuant to defense counsel's request, the court summoned the juror for

[5] To the extent that defendant perceives deficiencies in the cross-examination of other witnesses, we do not find that defense counsel behaved objectively unreasonably or that any prejudice resulted. *Vaughn*, 491 Mich at 669.

questioning, and the juror explained that she did not read anything beyond the headlines, and only recalled seeing the words "homicide" and "trial." She did not acquire any additional information, and was not influenced regarding her decision of the case.

Thus, trial counsel's questioning revealed that the juror had not read anything that would influence her decision. Given these circumstances, counsel's behavior in not seeking her removal was reasonable. *Vaughn*, 491 Mich at 669.

Because defendant has not established any errors, there is no cumulative effect that warrants reversal. *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008) ("Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.") (quotation marks and citation omitted).

C. PROSECUTOR'S CONDUCT

While defendant advances several more complaints about the prosecutor, the only cognizable legal claim not already addressed is that the prosecutor intentionally elicited testimony concerning defendant's unrelated criminal acts. We review this unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753.

"[A] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007) (quotations marks and citation omitted). Here, nothing in the record supports a finding that the prosecutor acted in bad faith. In regard to the witness in the hotel room, she was instructed to avoid mentioning the hostage situation, and the prosecutor instructed her to "stop" when she started to give an unresponsive answer. Regarding testimony from defendant's former girlfriend and the police officer, there simply is no indication that the prosecutor intended to inject improper evidence. Rather, these witnesses' answers were unresponsive and unforeseen. *Haywood*, 209 Mich App at 228.

We conclude that the prosecutor did not act in bad faith or engage in misconduct amounting to plain error.

D. OTHER MATTERS

Lastly, defendant advances several additional complaints in his Standard 4 brief, without analysis or factual support. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Consequently, defendant's remaining claims are abandoned. *Id.* Moreover, throughout defendant's Standard 4 brief, he asserts several of the same issues presented in his brief on appeal. We will not repeat our analysis of those issues here.

IX. CONCLUSION

Defendant is not entitled to relief based on evidentiary issues, the denial of an adjournment, ineffective assistance of counsel, the denial of a mistrial, prosecutorial misconduct,

the jury instructions, or juror misconduct. Defendant is correct that only two counts of first-degree murder should stand, in addition to two counts of armed robbery.

We have reviewed all remaining claims in defendant's briefs and find them to be without merit. We affirm in part, vacate defendant's sentence in part, and remand for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra